Why Not Try a

—a pertinent discussion of a perplexing problem by Arthur H. Hutchinson of the Seattle Bar.

UNITED STATES crime exceeds the English by a wide margin. The causes have been analyzed many times. Discussion helps to solve the problem. Here is another contribution that is offered for consideration.

The strategy of the prosecution on the one side, and the defense on the other, are diametrically opposed. The tactics of one look toward convicting a man; the other toward freeing him.

Let us examine the method pursued successfully by the defense. Then, when we see this, we will know the needs for the success of the prosecution.

There is an old saying, trite even in the American colonial days, to the effect that the shrewd criminal lawyer never permits the accused murderer to go to trial before the grass is green on the victim's grave.

Dilatory tactics are accepted as the successful procedure for the defense of a criminal action. It is founded upon a long history of human experience. It was a method used by the keenest lawyers for the defense in the time of Andrew Jackson. It is considered the safest form to-day.

Delay always inures to the benefit of the accused. It weakens the prosecution.

Delay usually means the scattering of witnesses, and often their removal from the jurisdiction of the court and loss by death. Time fades the memory and blurs the pictures of the happenings. Procrastination loses and destroys circumstantial evidence; diminishes the interest of the state. Protraction helps the accused to escape punishment.

Frequently, the prosecutor has to drop his case for the sole reason that his evidence has become dissipated, and he can no longer convict a seemingly guilty person.

Judge Malcom Douglas, of the superior court of the state of Washington for King county, has recently made public some statistics of two hundred criminal cases. Here is one taken at random, typical of the others. It was taken from the daily press and quotes as follows:

"The Supreme Court Will Not Review Case. Washington, January 13th.—O. W. Call, convicted of having violated the State Prohibition Law in Kitsap county, Washington, in 1925, was to-day refused a review by the supreme court."

This article was printed April, 1930, after a lapse of five years.

It is presumed that Call has been out on bail during this entire period; otherwise, he would have been a prisoner at the county jail, living at the expense of the public for a period of five years, awaiting the delays of the court. He would have served an unofficial five-year sentence before beginning his actual sentence as punishment for his crime. Had he finally been acquitted, he still would have suffered his five years in jail, although an innocent man in the eyes of the law.

Just imagine a petty crime

Criminal Case in Four Months?

dragged through the courts for five years before a final decision.

The public compares the so-called efficiency of the English criminal court to the reputed inefficiency of the American. Undoubtedly, 95 per cent of the so-called reputation for excellency of the English criminal procedure is based upon the speed with which the courts of justice mete out decisions to the accused.

It is probable that the American system of preliminary investigation is just as competent as the English. The American police department and bureaus of research probably show just as great diligence in investigating crime, arresting the accused, and assembling the evidence. The American prosecutors are probably just as proficient in trying their cases. The American judges, trained through our colleges and professional schools, are just as lettered.

The English system shows its superiority in the actual trial. It has developed and kept pace with the progress of the times. On the other hand, the American system is reactionary, and is practically the same as it was in the early days of the Revolutionary period.

Were Abraham Lincoln to step into the hearing of one of our criminal law courts to-day, he would find the practice about the same as it was when he himself rode the circuits on horseback, the period when letters were being sent by post chaise from town to town.

These old-time lawyers of past days would be amazed should they see the progress of the world at large; our correspondence traveling by airplane in a few hours across the entire continent, and our families listening to world news by radio. They would be dumbfounded to learn that central police stations could give orders to patrolling police in prowler cars over ether waves concerning crimes that were in the process of execution.

These old practitioners, dropping into a present preparation of a case, would be thrilled by scientific investigation of crimes and evidence through enlarged photography thrown upon screens and chemical analysis.

But when they stepped into the court room, the scene would be changed: their amazement would cease. They would then feel at home. They would realize that no matter how much the world at large has progressed since their day, yet nevertheless, the court-room procedure was exactly the same as it was ages ago when they were in the midst of practice. They would understand that no matter how quickly the accused was placed under arrest, yet the minute he was placed in jail,

that then the entire situation changed; that years rolled backward; that modern methods outside of the clanging jail door ceased; that the lead of history was immediately reeled into reverse,—back, not a hundred, but possibly two hundred, years,—and that from time to time archaic methods would be used to try the man of his crime.

Now, the question before all progressive thinkers is, Why is it necessary to stop modern progress at the jail door? Why should not civilization adapt modern speed methods to the court procedure of the modern time? It certainly would not be very difficult for the American courts to change a few rules and bring the criminal court practice up to date. It would not be necessary for us to follow the English procedure, unless we felt it wise. We could use our own machinery, but cut out wasted time. For instance:

(a) File information immediately upon arrest.

(b) Make the arraignments within twenty-four hours of the arrest.

(c) Call the trial within fifteen days of arrest.

(d) Allow ten of the jury to bring in a verdict.

(e) Shorten the time for motion for a new trial to two days after the verdict, with a hearing upon the same within forty-eight hours thereafter, judgment to be entered immediately upon the ruling.

(f) Allow five days for notice of appeal and filing of bond after the entry of judgment.

(g) Let the court reporters be officers of the court and paid by the state.

(h) Let the statement of facts be prepared and certified to the court directly within fifteen days after notice of appeal is filed.

(i) Three days be allowed to the court and counsel for the certifying of the statement of facts, except it might be increased for cause to seven days.

(j) Allow fifteen days after the certified copy of the statement of facts is served on the defendant by the court for the preparation and filing of his brief with the supreme court.

(k) Allow ten days for filing of the answering brief.

(l) Allow the defendant five days for serving filing reply brief.

(m) Allow the supreme court to set criminal cases on one day each week for hearing thirty days thereafter.

(n) Increase the number of departments of the supreme court, if necessary, so that criminal cases, taking precedence of others, could average a decision within fifty days after argument.

In this way, the whole procedure should not exceed four months.

We do not presume to say that these suggestions are the best possible, but we do insist that it is necessary to limit the time of criminal trials, to cover the entire space between the arrest for the crime and the final decision of the supreme court, to within a comparatively few weeks or months.

If this were done, there is no question but that the American people, feeling that the accused could be assured of a speedy and honest trial, would regain much of their lost confidence in the efficiency of the courts, and the present crime wave would be greatly reduced in seriousness.

What is Negligence?

By RALPH W. DOX

Of the Buffalo Bar

(Continued from previous issue)

The doctrine of *proximate cause*, first formulated by Lord Bacon, has produced in the common law an unusually rich jungle of judicial opinion. (R. C. L. devotes over 100 pages to its discussion). He wrote:

"It were infinite for the law to judge the cause of causes and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree. *In jure non remota causa sed proxima spectatur.*" (Quoted in 22 R. C. L., p. 114).

Philosophy and science admit a series or even a plurality of causes but the proximate cause (the *causa proxima* of scholastic philosophy—*Reinstadler: El. Phil. Schol.*, vol. I, p. 364) is the one that immediately precedes and produces the given effect. This meaning is more strictly adhered to in the law of insurance than in cases involving a breach of contract or tort. (22 R. C. L., pp. 213 et seq.) In the latter, the Baconian proximate cause is not always the immediate cause of the injuries.

It was not in the famous "squib case" (Scott *v.* Shepherd, 2 W. Bl. 892, 96 Eng. Reprint, 525) or the "negro boy case" of Vandenburgh *v.* Truax, 4 Denio, 464, 47 Am. Dec. 268, where defendant with a pick-axe chased into plaintiff's store the boy, who ran behind the counter, knocked the cock out of plaintiff's wine barrel and caused two gallons of port wine (*horribile dictu*) to spill on the floor.

In Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455, defendant's agent negligently labeled belladona "extract of dandelion" (*cause one*); defendant sold it to a wholesale druggist (*cause two*); the latter sold it to a retail druggist (*cause three*); he sold it to plaintiff (*cause four*); the latter's wife took it and suffered painful injuries (*cause five*). We can, in like manner, analyze the chain of causation in Lowery *v.* Manhattan R. Co. 99 N. Y. 158, 52 Am. Rep. 12, 1 N. E. 608, where defendant negligently let coal and ashes fall from its elevated locomotive on the back of X's horse, which started to run; X tried to check the horse by driving the wagon along the curb; the wagon was drawn over the curb and injured the plaintiff.

It is clear that the legal proximate cause is not the immediate efficient cause in any scientific or philosophic sense.

The courts have painfully elaborated their discussions of proximate cause. It has been said that the task of finding it is "something like trying to draw a line between night and day." (22 R. C. L., p. 115.) The U. S. Supreme Court has held: "If we could deduce from them (cases on proximate cause) the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations." Louisiana Mut. Ins. Co. *v.* Tweed, 7 Wall. 44, 52, 19 L. ed. 65, 67.

The rule of proximate cause has been held to mean that "the damage must be the proximate result of the negligent act. It must be such as the ordinary mind would reasonably ex-

pect as a probable result of the act, otherwise no liability exists."—Hoffman *v.* King, 160 N. Y. 618, 627, 73 Am. St. Rep. 715, 55 N. E. 401, 46 L.R.A. 672. This form of the rule is adopted in other states (22 R. C. L., pp. 119 et seq.).

The civil law does not speak of proximate cause. There are, for example, several theories in modern German jurisprudence of liability for negligent causation of damages but the one generally adopted is that of adequate causation (*adaequate Verursachung*), first propounded by Johannes Adolf von Kries (1858–), a professor of physiology. (*Prof. P. Oertmann: Schuldrecht, I*, p. 60, *Sammlung Goeschen.*) The condition theory (*Bedingungstheorie*), adopted in German criminal law, was taken from an English logician, John Stuart Mill (loc. cit., p. 59).

The adequate causation theory holds the defendant liable if, when he acted negligently, the injurious consequences of his conduct were highly probable according to the general experience of men. It seems to be substantially the same as the rule stated in Hoffman *v.* King, supra.

But suppose Y, when he suffers personal injuries resulting from X's negligence, has some physical idiosyncracy (like an abnormally thin skull) or some latent disease or "dormant lesion" (like syphilis or tuberculosis) and neither X nor Y nor perhaps any one else knew of this condition. Is X liable for the resulting aggravated injuries which would not have occurred had Y been in normal health? Some German advocates of the adequate causation theory answer yes, others answer no. (*Oertmann*, loc. cit., p. 61). The common law would hold him liable. But can the "ordinary mind . . . reasonably expect as probable" that an initially slight trauma will, acting on a latent disease by a chain of causation only known to experts in medicine, result in serious invalidity or death, when he does not even know that the injured person is suffering from such a disease? This raises the question whether the so-called proximate cause is to be determined prospectively or retrospectively, according to causation known to the ordinary layman or only to scientific experts. The rule stated in Hoffman *v.* King, supra, seems to determine it by the prevision of the ordinary layman but the courts, when allowing damages for injuries aggravated by latent disease, seem to determine it retrospectively on a causation established by medical experts.

We shall limit our discussion to the immediate harm of Y and not consider the resulting "proximate damages."

The cause of Y's harm is the negligent act of X, a human being. Perhaps it would be clearer if we should speak not of proximate cause but of the proximate responsible human agent. Now there may be more than one human agent in the chain of causation as in Thomas *v.* Winchester but there was no evidence in that case that any of them acted wilfully or negligently towards the plaintiff except the defendant druggist. He was the proximate responsible human agent. It seems that the matter of legal causation could be clarified if we should retrospectively trace back Y's harm to the proximate human agent and determine whether, according to ordinary or expert experience, the harm would not have resulted except for the conduct of such agent. If it would not have resulted without such conduct and he is legally responsible and his conduct was wilful or negligent, he is the legal cause of Y's harm. If he is legally irresponsible or his conduct was not wilful or negligent, then we must determine if his conduct probably resulted, according to ordinary human experience, from the conduct of some other human agent proximate to him and, whether such second agent is responsible and wilfully or negligently caused the conduct of the first agent. If so, he and not the first agent is the legal cause of Y's harm. We may follow this further, if necessary, until we arrive at the proximate responsible human agent as in Thomas *v.* Winchester and his act becomes the proximate cause (common law) or

adequate cause (German law) of Y's harm.

Suppose Y himself causes his own harm. If done intentionally he has no redress for *volenti non fit injuria* (a famous rule of the great Roman jurist Ulpian) and, if done negligently, he is "out of luck" at common law since the doctrine of contributory negligence was first clearly stated in the English case of Butterfield *v.* Forrester, 11 East. 60, 103 Eng. Reprint, 926, 19 Eng. Rul. Cas. 189. (20 R. C. L., p. 10). In admiralty he might recover something if the respondent was also negligent. The rule has been abolished by the workmen's compensation acts. Perhaps our sense of justice is satisfied by art. 254 of the German Civil Code, which provides: "If, in the occurrence of the damage, a fault of the one suffering the damage has co-operated (*mitgewirkt*), the obligation of reparation, as well as the amount of reparation to be made depends on the circumstances, especially in how far the damage was caused predominantly (*vorwiegend*) by the one or the other party. This also applies if the fault of the person suffering damage is limited to the fact that he omitted to warn the debtor[3] (*Schuldner*) of the danger of an unusually great damage which the debtor neither knew nor must have known or that he omitted to avoid or diminish the damage."

If our legislatures should enact such a law, our courts would not have to struggle to mitigate the rigor of the contributory negligence rule by the "last clear chance" doctrine, which started with the expiring groan of plaintiff's donkey in the English case of Davies *v.* Mann, 10 Mees. & W. 546, 152 Eng. Reprint, 588, 19 Eng. Rul. Cas. 190. "The poor brute meekly closed its wearied eyes and gave up the ghost, an apparently immortal spirit that has long since put Banquo's ghost to shame. From such an humble beginning arose the great doctrine of the 'last clear chance'."—Bogan *v.* Carolina C. R. Co., 129 N. C. 154, 158, 55 L.R.A. 418, 39 S. E. 808.

Causation properly speaking is purely an objective matter for philosopher and scientist and is not controlled by the subjective consideration whether someone of "ordinary mind" could have foreseen the result. The courts, in discussing causation, confuse this objective phase with the subjective phase of moral responsibility and prevision. We shall now consider the subjective element in negligence.

(b) *Standard of Care.* This is the psychological element. What is X's state of mind when he causes harm to Y? He may or may not intend to cause the harm. In the latter case, he may be compelled by superior force, may be perturbed, may be suffering from some mental or physical disability, may be in error or merely inattentive to the consequences of his acts.

Excluding the mental states of infancy and childhood, insanity, idiocy, intoxication, defect of mind or senses, and assuming that X is a normal adult, causing harm to Y through lack of care, we must ask what is the standard of care?

The Roman law, as we have seen, had an abstract (*culpa in abstracto*) and a concrete (*culpa in concreto*) standard. The latter was the *diligentia quam suis*—the care one was wont to use in his own concerns. The ordinary abstract standard was the care of a careful father of a family.

The common law, for ordinary care, seems to adopt the standard of the average prudent man under the given circumstances, though our courts have blown out a mist of words in saying so. They have held that ordinary care is that exercised by "an ordinary person, a prudent person, a reasonable person, every prudent person, a reasonably prudent person, an ordinarily careful person, a reasonably cautious person, an ordinarily reasonable per-

(continued on page twenty-two)

[3] Since torts, in the civil law, create a species of obligation, the passage becomes clearer to us if we substitute the word defendant for the word "debtor" in this and the following citations from the German Civil Code.

Justice Roberts Known As Fighter With a Smile

His Masterly Prosecution of Fall and Others Won Fame for New Justice of the Supreme Court of the U. S.

Photo by Underwood & Underwood

JUSTICE OWEN J. ROBERTS

A LITTLE more than six years ago when the oil lease scandals had reached the stage of prosecution, President Coolidge chose a Philadelphia lawyer to represent the government in its legal campaign. That man, whose name at the time was little known outside Pennsylvania, was Owen J. Roberts. Last Tuesday (May 20th) the Senate without a dissenting vote confirmed him as an Associate Justice of the Supreme Court of the United States.

Roberts the Lawyer.

What kind of a lawyer is Justice Roberts and what kind of a man is he personally? To begin with, he is in the prime of life. Even his bitterest court opponents admit his great ability. Judges have said that in the presentation of legal questions of major magnitude Justice Roberts takes his place as one of the really great lawyers of the American bar. No lawyer can hit harder and smile in doing it, or with more effect, than can the newest justice of the highest court in America. He is what Ex-Senator George Wharton Pepper of Pennsylvania, arguing for his confirmation as government counsel in February, 1924, said he was, "a fighting Welshman," for, like so many other eminent Pennsylvanians, Wales was the homeland of his paternal ancestors.

Justice Roberts was 55 years of age on May 2. He appears younger. Tall, square-shouldered, quick stepping, without an ounce of superfluous flesh, he looks the athlete he is. Clean shaven, hair just turning gray, piercing blue eyes, a voice almost as Southern as it is Yankee in tone, a smile that only disappears when the battle rages hottest. He is always dressed well, but never "flashily." Easily approached, utterly lacking in conceit, a good friend, a fair fighter always.

A Teacher Twenty Years.

Germantown—and in passing it may be noted that much of the blood that is not Welsh in him is German—is the place where Owen Roberts was born, on May 2, 1875. There he grew up. There he received his early training in the Germantown Academy. As a boy, the story is, he wanted to be a house painter. Then he switched to railroading. These

were boyish dreams. When they passed he began to take really serious views of things and decided that teaching was the calling for which he was best fitted.

He taught law for nearly twenty years. A graduate of the University of Pennsylvania, he was a member of the legal faculty of that institution from 1898 to 1918. When the United States entered the World War Justice Roberts directed the prosecution for the government of espionage cases in Pennsylvania. This marked the passing of the teacher and the emergence of the court lawyer.

No lawyer in the history of American justice ever faced a more difficult task than did Justice Roberts and Senator Pomerene when, in the Winter of 1924, President Coolidge and the Senate placed on their shoulders the burden of the gravest criminal and civil court actions that ever involved a Cabinet officer in our history.

Work in the Oil Cases.

When Roberts took off his coat and started to work on the oil cases about the only evidence he had was the $100,000 which Doheny had packed in the famous "little black bag" and sent to Fall in the Winter of 1922. The evidence in the Teapot Dome case, considered purely from the standpoint of admissible facts, was just about nil. The Continental Trading case deal was still a well-kept secret. In the exposure of that now famous deal which was to bring old Jim O'Neill of the Prairie, Blackmer of the Midwest, Stewart of the Standard Oil Company of Indiana, and Osler of Canada into the oil scandals, Roberts was a Sherlock Holmes as well as a lawyer.

By bare chance he ran across a trail on the dimmest sort of a track. Quietly investigating the financial affairs of Fall, Roberts' curiosity was aroused when he discovered that large amounts of Liberty bonds had been deposited to Fall's credit in various banks in Colorado, New Mexico and Texas.

But he did not have the serial numbers of the securities, and without the identifying numbers he was powerless to proceed. With just a string to hold on to, Roberts hit the trail. In El Paso he found the first ray of light when a young Mexican bank clerk recalled that he had listed the numbers of the bonds. They were traced and found to have been purchased originally for the account of the Continental Trading Company, Limited, of Canada. In Toronto Roberts identified the Continental as the mythical purchaser of more than 33,000,000 barrels of Texas crude oil, out of the resale profits of which Fall, for some reason or other, had received a fortune of more than $233,000. The directorate was a "dummy" one, but the men in control were Blackmer, O'Neill, Stewart and Osler.

Months passed while Roberts labored day and night to get the facts. In the meantime Blackmer and O'Neill skipped away to France, where they have since remained. Osler went big-game hunting in Africa, while only Colonel Stewart remained in America. It was the admission of the Continental deal into the Fall bribery case that, more than anything else, brought about the conviction of Fall. The evidence could not be used against Doheny, since he was in no wise involved in the deal. Doheny was acquitted.

Presenting the Evidence.

The battle to get the Continental bonds before the Fall jury was probably the hardest fought of any that marked the years' long series of court actions growing out of the oil scandal. Lawyers outside the case shook their heads and said that Roberts, though a great lawyer, could not get the Continental before the jury. But Roberts found some old precedents which permitted the introduction of evidence under certain conditions to show a defendant's state of mind at the time the alleged crime was committed. Roberts fought and won, and Fall was convicted.

When it was all over there was no show of elation on the part of Mr. Roberts. He was sorry for Fall personally, although he did not hesitate to say he thought the verdict was a most wholesome thing. That was the way he talked in the hour of his great legal victory.—Reprinted from The New York Times by permission.

Some Interesting Statistics About Lawyers

MR. ALEXANDER B. ANDREWS, President of the North Carolina Bar Association, in an address to that body on "Legal Education and Admission to the Bar," strongly advocates the standards for law schools recommended by the American Bar Association, including the completion of a two years' college course, or its equivalent, prior to admission; a course of three years; an adequate library for students; and, among its teachers, a sufficient number devoting their entire time to the school to insure personal acquaintance with and influence over the whole student body.

The address presents interesting statistics regarding the ratio between population and lawyers, some of which are reproduced here:

POPULATION PER LAWYER

	1850	1860	1870	1880	1890	1900	1910	1920
Alabama	1,353	1,263	1,183	1,582	1,152	1,145	1,436	1,658
Arizona	....	....	459	333	555	460	608	754
Arkansas	937	932	1,170	1,077	1,042	949	1,166	1,309
California	484	425	502	455	375	347	484	507
Colorado	....	385	402	240	326	330	485	610
Connecticut	1,283	983	1,374	782	895	841	1,232	1,031
Delaware	1,989	1,289	1,488	1,154	957	859	1,124	1,304
District of Columbia	522	397	320	193	163	189	214	181
Florida	667	811	1,260	880	681	859	1,055	850
Georgia	1,274	905	1,391	1,076	1,061	926	1,162	1,144
Idaho	....	....	357	534	503	464	578	662
Illinois	1,042	1,067	946	764	660	533	700	733
Indiana	1,069	1,115	997	681	683	587	747	886
Iowa	706	581	820	622	682	650	862	963
Kansas	....	296	534	667	481	617	948	1,055
Kentucky	987	971	851	832	780	682	856	1,015
Louisiana	832	1,014	1,096	1,135	1,044	1,049	1,341	1,491
Maine	1,041	972	1,141	895	880	775	863	958
Maryland	1,089	1,146	1,011	860	702	583	648	684
Massachusetts	894	1,037	1,140	898	864	811	762	777
Michigan	710	902	1,014	780	790	788	991	1,207
Minnesota	264	422	979	861	611	695	863	913
Mississippi	1,028	1,276	1,310	1,379	1,436	1,510	1,475	1,546
Missouri	992	995	498	745	677	587	722	755
Montana	....	....	307	508	416	448	601	627
Nebraska	....	221	602	532	433	532	818	848
Nevada	....	380	255	523	473	403	278	336
New Hampshire	975	869	912	908	902	879	1,057	1,169
New Jersey	1,188	1,251	1,020	729	668	657	784	805
New Mexico	....	4,065	1,914	934	670	712	847	1,053
New York	726	694	741	537	536	496	527	562
North Carolina	2,178	1,985	1,866	1,813	1,641	1,499	1,680	1,615
North Dakota	a	806a	616a	450	566	698	862	1,019
Ohio	976	922	1,039	712	688	624	758	888
Oklahoma	....	....	....	....	979	1,179	605	719
Oregon	604	504	467	561	479	399	512	550
Pennsylvania	923	1,203	1,082	857	780	756	1,063	1,285
Rhode Island	1,294	1,818	1,333	1,166	1,220	1,161	1,166	1,175
South Carolina	1,683	1,539	1,823	1,621	1,491	1,569	1,668	1,702
South Dakota	a	806a	616a	450	471	579	846	909
Tennessee	1,383	1,070	1,117	1,024	856	740	1,040	1,146
Texas	496	668	797	754	628	660	855	876

POPULATION PER LAWYER—*continued.*

	1850	1860	1870	1880	1890	1900	1910	1920
Utah	2,276	5,034	3,773	1,209	669	637	837	852
Vermont	635	....	....	783	727	810	934	1,023
Virginia	1,027	1,190	1,139	1,116	1,003	912	1,137	1,166
Washington	....	527	427	664	296	336	457	606
West Virginia	....	....	1,105	983	814	716	867	1,104
Wisconsin	627	684	1,344	1,098	1,001	920	1,228	1,330
Wyoming	....	....	274	611	477	651	712	725
United States	968	947	946	782	682	662	801	862

NUMBER OF LAWYERS, EIGHT DECENNIAL CENSUS YEARS, 1850–1920

	United States		North Carolina	
	Population	Lawyers	Population	Lawyers
1850	23,191,876	23,939	869,039	399
1860	31,443,321	33,193	992,622	500
1870	35,558,371	40,736	1,071,361	574
1880	50,155,783	64,137	1,399,750	772
1890	62,947,714	89,630	1,617,749	992
1900	75,994,575	114,703	1,893,810	1,263
1910	91,972,266	114,704	2,206,287	1,313
1920	105,710,620	122,519	2,559,123	1,585

	United States		North Carolina	
	Ratio to Each 100,000 of Population	One Lawyer for Each	Ratio to Each 100,000 of Population	One Lawyer For Each
1850	103	969	45	2,178
1860	111	903	50	1,985
1870	105	873	53	1,866
1880	128	782	55	1,813
1890	142	704	61	1,631
1900	151	664	66	1,499
1910	124	801	59	1,680
1920	115	862	62	1,615

It is entertaining to see how the proportion of lawyers works out in other countries and nations. Attached hereto is a statement showing the proportion of lawyers in England and Wales and Canada, showing (1) the population, (2) number of lawyers, (3) the number per 100,000 of population, and (4) the ratio of population to each lawyer. This, read in connection with the tabulation showing the number of lawyers in each of the several states at the time of the eight decennial censuses, shows that in the United States there are approximately from two to three times as many lawyers in proportion to population as there are in the other countries of the world.

ENGLAND AND WALES

Year	Population	Attorneys	Per 100,000 of Population	Ratio of Population to Each Lawyer
1921	37,885,242	17,946	47	2,111

(Barristers 2,973, and solicitors 14,973.)

CANADA

Name	Population 1921 (Census)	Population 1928 (Estimate)	Lawyers	Ratio to Each 100,000	One Lawyer for Each
Alberta	588,454	631,900	554	94	1,062
British Columbia	524,582	583,000	646	123	812
Manitoba	610,118	655,000	668	109	913
New Brunswick	387,876	415,000	200	51	1,939
Nova Scotia	523,837	547,000	255	48	2,054
Ontario	2,933,662	3,229,000	2,506	85	1,170
Prince Edward Island	88,615	86,400	46	51	1,926
Quebec	2,361,199	2,647,000	1,231	51	1,918
Saskatchewan	757,510	851,000	555	73	1,382
Yukon District	4,157	3,500	2	48	2,078
North West Territory	7,988	9,200	....	...	....
Canada	8,788,483	9,658,000	6,663	75	1,319
Newfoundland	263,033	.....	46	17	5,718

Fatal Car Accidents Analyzed for Typical Driver and Victim

IN an attempt to answer the question of who is the typical motor vehicle driver causing fatal accidents and who is the typical victim of such accidents, the governor's committee on street and highway safety has analyzed the detailed reports of all automobile fatalities in the State last year and has evolved two composite characters.

The person who caused such accidents in 1929 is identified by the statistics, states the committee, as follows:

"He was a physically perfect, sober, alert man, over 25 years old, who had driven an automobile for more than five years. He was driving a passenger car equipped with two-wheel brakes in perfect order, as was also his emergency brake. His lights and other equipment were in good condition. He was driving in broad daylight, between 6 and 7 p. m. on a beautiful, clear Sunday afternoon proceeding straight ahead on a straight, smooth bituminous pavement, the surface of which was absolutely dry. There were neither obstructions on the highway nor to the driver's view. On the other hand, there were no traffic lights and there was no traffic officer on duty. The location was a thickly settled residential district, yet the driver was moving at more than 25 miles an hour. He was going too fast for existing conditions and was to blame for the death."

The victim is identified by the committee, likewise, through a study of the statistics, as follows:

"He was a physically perfect, sober, attentive man, over 55 years old. He was crossing the street between intersections in the same district through which the 'killer' happened to be driving. Aside from the fact that he did not attempt to cross the street at its intersection, he was not otherwise at fault. He died of a fractured skull."—From U. S. Daily, May 27, 1930.

Among the New Decisions

An upright judge has more regard to justice than to men

Automobiles — *question for jury — negligence.* The negligence of defendant, whose automobile shortly after being parked on a grade, started down hill and injured plaintiff, is held in Biller v. Meyer, 33 F. (2d) 440, to be a question for the jury, under the doctrine of res ipsa loquitur, although defendant testified that he had set the brakes and put the gear in reverse.

This case is annotated in 66 A.L.R. 436, on the liability for injury or damage resulting from starting of parked automobile without interference of third person.

Banks — *misstatements by cashier to purchaser of stock — liability.* A bank cashier is not acting for the bank within the scope of his employment in making statements as to the bank's condition to an intending purchaser of stock from a stockholder, so as to subject the bank to liability for the difference between the sum paid for the stock and its actual value, where the bank profited in no way by the sale, it is held in Bailey v. Union Nat. Bank, 159 Tenn. 659, 21 S. W. (2d) 393, annotated in 66 A.L.R. 1447, on responsibility of corporation for misstatements by officer or employee to induce or influence the purchase of stock.

Bills and notes — *defenses.* Breach of trust on the part of one to whom a note had been intrusted to be negotiated for the benefit of another, in pledging it for his own benefit, is held not available as a defense to the maker when sued by the pledgee thereon, in Bowles v. Oakman, 246 Mich. 674, 225 N. W. 613, annotated in 66 A.L.R. 797, on the right of a maker or indorser of a note to set up fraud in transfer by intermediate holder to plaintiff.

Charities — *trust for benefit of animals.* That a trust for the benefit of animals may be a valid charitable trust if, in the execution of the trust, a benefit to the public is necessarily involved, is held in Re Grove-Grady ([1929] 1 Ch. 557) which is annotated in 66 A.L.R. 448 on preservation or protection of animals or birds as subject of charitable trust.

Chattel mortgage — *description — bona fide purchaser.* A chattel mortgage is held in the Alabama case of Stewart v. Clemens, 124 So. 863, to be ineffective as against a purchaser in good faith, for value, which, without showing the location of the mortgaged property or the residence of the mortgagor, merely describes the mortgaged property as "all of my or our live stock and personal property of every kind now in my or our possession and owned by me or us."

Following this case, in 66 A.L.R. 1454, is annotation on the sufficiency of description in a chattel mortgage covering all live stock, or all live stock of a particular genus.

Constitutional law — *due process — requiring concurrence of more than majority of appellate court in holding statute unconstitutional.* A state constitutional provision that no law shall be held unconstitutional by the supreme court of the state without a concurrence of at least all but one of the judges does not violate the due process clause of the 14th Amendment to the Federal Constitution, it is held in State ex rel. Bryant v. State, 281 U. S. 74, 74 L. ed. (Adv. 333), 50 Sup. Ct. Rep. 228, which is annotated in 66 A.L.R. 1460, on the validity and effect of provisions limiting the power of courts to declare a statute unconstitutional.

Constitutional law — *succession tax — retrospective operation — prior trust — effect of power of revocation.* A transfer effected by a trust created prior to the passage of the statute taxing transfers, which is subject to a power of revocation in the transferrer, terminable at his death, is held not to be complete until his death and may be made taxable by a statute passed prior to his death, in Reinecke v. Northern Trust Co. 278 U. S. 339, 78 L. ed. 410, 49 Sup. Ct. Rep. 123, annotated in 66 A.L.R. 397, on retrospective operation of succession tax.

Contracts — *construction of building — parol modification.* Provisions in a building contract that no alterations shall be made in the work except upon a written order of the architect, and that no alterations, additions, deviations, or omissions which affect the price or the time for completion shall be made without a written order from the owner, it is held in the Arizona case of Sitkin v. Smith, 276 Pac. 521, do not prevent the parties from subsequently waiving such requirement and orally altering or modifying the written contract.

Annotation on building contracts: effect of stipulation that alterations or extras must be ordered in writing, is appended to this case in 66 A.L.R. 645.

Corporations — *name — common right.* That one corporation cannot restrain another from using in its corporate title a name or word to which all others have a common right is held in Federal Securities Co. v. Federal Securities Corp. 129 Or. 375, 276 Pac. 1100, which is annotated in 66 A.L.R. 934.

Criminal law — *defenses — entrapment.* If a criminal intent originates in the mind of the defendant, the fact that government agents furnish an opportunity for or aid in the commission of the crime in order successfully to prosecute him therefor it is held to be no defense in Robinson v. United States, 32 F. (2d) 505; but if he has never previously committed such an offense as that charged, and never conceived any intention of committing the offense prosecuted, and had not the means to do so, the fact that the officers of the government incited him to commit the offense charged, in order to entrap him, is a defense.

Entrapment to commit crime with view to prosecution therefor, is the subject of the annotation which accompanies this case in 66 A.L.R. 468.

Criminal law — *plea of guilty — refusal of leave to withdraw — propriety.* A motion for leave to withdraw a plea of guilty and to enter a plea of not guilty is improperly denied in the Indiana case of Cassidy v. State, 168 N. E. 18, annotated in 66 A.L.R. 622, where it appears that the accused, charged with a crime punishable with imprisonment for life, was a youth of eighteen, of deficient mentality and little education, working and living among strangers; that he did not know or understand the nature of the charge against him or the penalty therefor, or his right to the aid of counsel; that his employer, without knowing the nature of the offense, advised him to plead guilty, in the belief that if he did so he would merely be fined; and that the judge before whom he was brought for trial questioned him as to the alleged offense, and said that, in view of his

confession of guilt, it would be useless to employ counsel.

Crops — *grown during period of redemption from foreclosure.* A mortgagor is held in the Washington Case of McNulty v. Dean, 281 Pac. 9, entitled to a crop matured but not harvested at the expiration of the period of redemption from sale on foreclosure, where a statute vests in him a right to possession during such period and provides that, if the property is not redeemed, the purchaser shall have a lien upon the crops "raised or harvested" thereon during the period of such possession for interest on the purchase price during such period.

This case is followed in 66 A.L.R. 1417, by annotation on the right in respect of crops grown during period of redemption after judicial or execution sale.

Damages — *automobile collision — damages attributable to plaintiff's excessive speed.* A driver of an automobile negligently colliding with another car is held in Mahoney v. Beatman, 110 Conn. 184, 147 Atl. 762, not exonerated from any part of the damage to such car by reason of the fact that, because of the excessive speed with which it was traveling, it could not be brought under control in time to prevent it from running off the road and overturning, where no negligence on the part of the driver of the second car is found.

Excessive speed, not the proximate cause of automobile accident, but which aggravates its consequences, as affecting extent of liability, is the subject of the annotation appended to this case in 66 A.L.R. 1121.

Dedication — *highway purposes — effect.* Where an offer to dedicate land as a street is found not to have been withdrawn prior to an acceptance thirty-one years later, it is held that the question of prescription is not a material issue in an action to enjoin the obstruction of the street by one claiming title thereto, in the California case of Yuba City v. Consolidated Mausoleum Syndicate, 279 Pac. 427, which is followed in 66 A.L.R. 318, by annotation on dedication; time for acceptance.

Divorce — *alimony — amount — aid from relatives.* Alimony and allowances for support of children it is held in the Rhode Island case of Boyden v. Boyden, 147 Atl. 621, may not be based on the assumption that the husband's relatives will furnish the necessary amounts for the sake of the wife and children, or to keep the husband from being committed for contempt in failing to comply with the court's order.

Gratuities or expectations as affecting amount of alimony is the subject of the annotation in 66 A.L.R. 214.

Dower — *in what property — equitable interest.* That the wife of one entering into a contract for the purchase of real estate has, from the time of the execution of the contract, an inchoate right of dower in the property, is held in the Iowa case of Harrington v. Feddersen, 226 N. W. 110,

Annotation on dower rights of wife of purchaser under executory contract, accompanies this case in 66 A.L.R. 59.

Elections — *contest — keeping polls open beyond closing time.* The keeping of polls open and the reception of votes after the time for closing, without fraud or fault on the part of the successful candidate, is held in the Wyoming case of Hamilton v. Marshall, 282 Pac. 1058, not ground for contesting the election unless it appears that enough of the votes so received were cast for the successful candidate to change the result.

This case is followed in 66 A.L.R. 1154, by annotation on violation of law as regards time for keeping polls open as affecting election results.

Evidence — *admissibility — oral testimony as to action at stockholders' meeting.* Oral testimony of those present at a stockholders' meeting is held to be admissible in the Wisconsin case of Huebner v. Advance Refrigerator Co. 227 N. W. 868, to prove ac-

tion taken at such meeting, which, through inadventence or mistake, is not recorded in the minutes; though such evidence is not admissible where the effect thereof will be to vary or contradict the record.

The admissibility of oral evidence as to proceedings at meetings of stockholders or directors of private corporations or associations is considered in the annotation which accompanies this case in 66 A.L.R. 1325.

Evidence — *burden of proof — absence of undue influence.* That the burden of proving absence of undue influence on the part of a legatee in confidential relations with the testator is on him only where he is instrumental in procuring the legacy, is held in Re Llewellyn, 296 Pa. 74, 145 Atl. 810, which is followed by annotation in 66 A.L.R. 222, on presumption and burden of proof as to undue influence on testator.

Evidence — *opinion as to whether accident was avoidable.* The driver of an automobile it is held in the Vermont case of Merrihew v. Goodspeed, 147 Atl. 346, may properly be permitted to testify, in an action for the death of a child struck by it, that he knew of nothing he could have done that he did not do to avoid hitting the child, where the evidence for the defense tended to show that the child was hidden from sight by a car backing from a driveway, and ran suddenly out as the defendant was passing, and too close to enable him to avoid the accident.

Annotation on the admissibility of witness's conclusion as to care exercised in driving automobile, is appended to this case in 66 A.L.R. 1109.

Evidence — *presumption — testator's intent.* Where a husband who had executed a will giving his wife the same interest in his estate that she would have received had he died intestate did not change his will after the enactment, two years before his death, of an amendatory statute enlarging the widow's rights, it will be presumed in McCormick v. Hall, 337 Ill. 232, 168 N. E. 900, that he intended her to take according to the statute as amended.

The annotation which accompanies this case in 66 A.L.R. 1062, deals with wills, statute governing as to time where disposition is made as in case of intestacy.

Evidence — *search and seizure — wire tapping as.* The mere tapping of telephone wires off the premises of accused, over which persons accused of violating criminal laws of the United States are engaged in conversation, is held in Olmstead v. United States, 277 U. S. 438, 72 L. ed. 944, 48 Sup. Ct. Rep. 564, not to be a violation of the constitutional amendment that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and therefore evidence so obtained is not inadmissible in aid of prosecutions for the alleged offenses.

The admissibility of evidence obtained by government or other public officer by intercepting letter or telegraph or telephone message, is treated in the annotation accompanying this case in 66 A.L.R. 376.

Executors — *compensation — allowance for extraofficial services.* No allowance can be made to an executor it is held in the South Dakota case of Re Balbach, 227 N. W. 886, for labor performed and services rendered by him in connection with property belonging to the estate, not usually performed by an executor in person, and which it would have been necessary for him to hire had he not performed them himself, under a statute providing that an executor "shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as are provided" by the statute, as such provision contemplates only actual disbursements.

The right of an executor or administrator to extra compensation for services other than attorney's services is considered in the annotation appended to this case in 66 A.L.R. 508.

Federal Radio Commission — *appeal — moot question.* An appeal from the refusal by the Federal Radio Commission to renew a broadcasting station license is held in Technical Radio Laboratory v. Federal Radio Commission, 36 F. (2d) 111, not to be rendered moot by the fact that the period covered by the license has expired, where such interpretation would practically nullify the statutory provision for appeal, and the right to a license includes a continuing right to apply thereafter at proper times for successive renewals thereof.

Legal aspects of radio communication and broadcasting, follows this case in 66 A.L.R. 1355.

Gift — *joint deposit.* Independently of statute, a savings bank deposit made by one person to the credit of herself and another, "payable to either or the survivor of them," and the delivery of the pass book to the latter, it is held in Moskowitz v. Marrow, 251 N. Y. 380, 167 N. E. 506, would have been insufficient either to establish an intention to make a gift or to effectuate a delivery of the subject-matter of a gift.

Gift or trust by deposit of funds belonging to depositor in a bank account in the name of himself and another, is the subject of the annotation which accompanies this case in 66 A.L.R. 870.

Guaranty — *fraud.* One who signs an instrument importing a guaranty by him of payment for merchandise it is held in the Virginia case of Sager v. W. T. Raleigh Co. 150 S. E. 244, cannot avoid liability to a manufacturer who, in good faith, accepted the same and furnished merchandise in reliance thereon, because of his own reliance, without reading, or having the instrument read to him, on the principal's statement that it was merely a recommendation of the character of, or an expression of satisfaction with, work done by the principal.

Ignorance or mistake as to character of instrument signed as affecting liability of surety or guarantor is

considered in the annotation appended to this case in 66 A.L.R. 305.

Highways — *municipal powers — regulating operation of motorbusses.* The enactment of a statute which subjects every phase of the relations between every public utility and the public to the supervision and regulation of the state public utilities commission it is held in Chicago Motor Coach Co. v. Chicago, 337 Ill. 200, 169 N. E. 22, operates to withdraw from municipalities such power as they had previously exercised in the premises; and therefore to preclude a city from requiring authority to be obtained from its council as a condition of the right to operate motorbusses on its streets.

The power of a municipality to deny the use of its streets to a public carrier which has obtained from the state commission a certificate of public convenience is considered in the annotation, which accompanies this case in 66 A.L.R. 837.

Highways — *tax for connection by abutting owner.* A city is held in Shawnee v. Robbins Bros. Tire Co. 134 Okla. 142, 272 Pac. 457, to be without authority to enforce or collect a fee, tax, or charge for the privilege of using or maintaining a driveway from the street or alley across the sidewalk space to the lot or property abutting thereon, by the owner or lessee, who conducts a business thereon, for the purpose of ingress and egress by himself and his customers.

The power to regulate or prohibit driveways across sidewalks is considered in the annotation appended to this case in 66 A.L.R. 1047.

Injunction — *enforcing restrictive covenant — changed conditions.* Where it appears that one applying for injunctive enforcement of a restrictive covenant has, by reason of changed conditions, no equitably substantial benefit to be thereby protected, but that the application is, in fact, part of an attempt to levy and collect a contribution representing the increased value of the restrictive property, the application, it is held in the New Jersey case of Welitoff v. Kohl, 147 Atl. 390, will be refused and the applying party relegated to the courts of law for such compensation as damages for the breach of the covenant, when and if it shall occur, will afford him.

The annotation appended to this case in 66 A.L.R. 1317 pertains to the right of one not otherwise damaged by violation of restrictive covenant to relief in Equity or at law upon the theory that restriction reduced the price received for property affected.

Insurance — *additional insurance — policy covering mortgagee's interest.* A policy of insurance taken out by a mortgagor, containing a provision avoiding it should other insurance be taken out on the property without the insurer's consent, is held in the Colorado case of Farmers' Union Mut. Protective Asso. of Colorado v. San Luis State Bank, 281 Pac. 366, not invalidated by the act of the mortgagee in obtaining insurance on the latter's interest in the property.

This case is followed in 66 A.L.R. 1166, on the procuring of insurance by holder of mortgage or deed of trust as violation of provision in mortgagor's policy against additional insurance.

Intoxicating liquors — *forfeiture of property used in illicit manufacture — electric plant.* An independent electric plant installed on private premises by a conditional vendor, with a view to supplying light and power for legitimate purposes, does not, it is held in Kohler Co. v. United States, (33 F. (2d) 225), by reason of the fact that electricity therefrom is used in the illegal distillation of intoxicating liquor, become liable to forfeiture under § 25, title II., of the National Prohibition Act (U. S. C. title 27, § 39), which provides that it shall be unlawful to have or possess any property designed for the manufacture of liquor intended for use in violating such act, or which has been so used, and that no property rights shall exist

in any such property, the operation of such statute being properly confined to property designed for the manufacture of liquor.

Annotation on property subject to forfeiture under the provision of the National Prohibition Act in relation to "property designed for the manufacture of liquor," accompanies this case in 66 A.L.R. 713.

Judgment — *for alimony — priority.* A judgment for permanent alimony, payable in stated monthly instalments, and not for a fixed gross sum, it is held in Chero-Cola Co. v. May, 169 Ga. 273, 149 S. E. 895, does not create a lien for monthly instalments not due when creditors acquired their liens, upon the property of the husband which he then owns or may afterwards acquire, superior to liens which he may subsequently create on such property in favor of other creditors, where no lien is expressly created upon such property in the judgment for alimony.

Annotation on priority as between decree for alimony and claims of other creditors, follows this case in 66 A.L.R. 1469.

Motorbusses and taxicab — *injunction — unfair competition.* A taxicab driver, though having the right, pursuant to private contracts, to carry passengers on casual trips, has no right to engage in competition with a motorbus line holding a certificate of convenience and necessity, by seeking out and picking up its prospective passengers at any time or place suiting his convenience, it is held in Slusher v. Safety Coach Transit Co. 229 Ky. 731, 17 S. W. (2d) 1012, annotated in 66 A.L.R. 1378, on the right of a bus company or street car company to enjoin a taxicab driver from picking up intending passengers.

Railroads. — *signals at crossing — persons entitled.* The duty imposed on a railroad engineman to sound the whistle or ring the bell when approaching a public crossing, or a crossing maintained by the railroad for use of, and used by, the public, is owing only to those using the track in passing over the crossing, and not to trespassers on or near the track elsewhere; and, in a suit by a trespasser using the right of way for convenience or pleasure, for injuries received near a crossing, it is held reversible error in the case of Shirley v. Norfolk & W. R. Co. 107 W. Va. 21, 147 S. E. 705, to show that the crossing warnings were not given; there being no unusual circumstances which would require them to be given.

Annotation on failure or delay in sounding crossing signals as affecting liability of railroad company to persons not crossing nor about to cross track, is appended to this case in 66 A.L.R. 807.

Taxes — *sale — purchase by state — personal liability for tax.* Where land had been sold to state for taxes, and sales appeared regular on their face, it is held in the Mississippi case of Carrier Lumber & Mfg. Co. v. Quitman County, 124 So. 437, annotated in 66 A.L.R. 614, that the county could not sue taxpayer under Code 1906, § 4256 (Hemingway's Code 1927, § 8189), for personal debt for taxes, since sale to state discharge personal liability of taxpayer, and there was no personal debt on which action under statute could rest.

Workmen's Compensation — *liability for injury to servant — effect of trespass.* A master, it is held in Bountiful Brick Co. v. Giles, 276 U. S. 154, 72 L. ed. 507, 48 Sup. Ct. Rep. 221, cannot avoid liability for injury to his employee by a railroad train while on his way to work, by the fact that the employee was a trespasser on the railroad track, if the master consents to the trespass.

Annotation on workmen's compensation for an injury while crossing or walking along railroad or street railway tracks, going to or from work, as arising out of and in the course of employment, is considered in this case in 66 A.L.R. 1402.

What Is Negligence? (Continued from page seven)

son, an ordinary, prudent person, a careful and prudent person, a cautious and prudent person, a discreet and cautious person, a reasonable and prudent person, a reasonable or careful person, an ordinarily prudent and careful person, an ordinarily prudent and cautious person, an ordinarily reasonable and prudent person, a reasonably prudent and careful person, a reasonably cautious and prudent person, an ordinarily prudent and diligent person, an ordinarily prudent normal person, a reasonable, prudent and cautious person, an ordinarily reasonable, careful and prudent person, an ordinarily careful, prudent and humane person, a person of average prudence, a person of common prudence, a person of ordinary prudence, a person of reasonable prudence, a person of ordinarily prudent habits, a person of reasonable or ordinary prudence" and so on *ad nauseam*. All this and still more, with citation of cases, is found in 45 C. J., pp. 685–687.

Who is this average prudent man with so many learned epithets? Is there any standard for prudence such as the "mental age" of intelligence tests? When we scan the "sucker lists," read of safety campaigns, get incessantly admonished to be careful, it may be asked if the prudent man is not as rare as the honest man whom Diogenes sought with his lantern.

How this average prudent man, when found, would act is a guess—"the degree of care that twelve men, selected at random from the vicinage, will say is reasonable under all the circumstances."—Spannknebel *v.* New York C. & H. R. R. Co. 127 App. Div. 345, 346, 347, 111 N. Y. Supp. 705.

The first draft of the German Civil Code made the standard of ordinary care that of the ordinary father of a family (*ordentlicher Hausvater*)—*Windscheid: Pandekten*, ed. Kipp, vol. I, p. 526. In the final draft, which went into effect in 1900, it became "*die im Verkehr erforderliche Sorgfalt*," which we can best translate—"the care requisite in human intercourse."

"Art. 276. The debtor (*Schuldner*) is, so far as not otherwise determined, liable for wilful act and negligence. Whoever omits the care requisite in human intercourse acts negligently. . . . The liability for wilful act cannot be remitted to the debtor in advance."

This requisite care depends on the nature of each act. More care is required in driving an automobile than in pushing a wheelbarrow, in performing a major surgical operation than in carving a goose. This German standard means about the same as "due care under the circumstances."

Prudence involves intelligent prevision—not the automatic or instinctive prevision of the squirrel or honey bee. (Some courts oddly enough exclude intelligence—45 C. J. p. 687). Some consequences result, according to natural laws, with such certainty that they can be predicted—like eclipses and chemical combinations. The habits of men and brute animals permit us to predict their conduct with some degree of certainty. But the law, being a practical body of rules for all sorts and conditions of men, cannot justly make plain John Doe liable for damages to a clover crop resulting from killing an old maid's cat, although Darwin has shown that the cat may have killed the field mice which destroyed the nests of the bees which distributed the fertilizing pollen to the clover. Suppose this damage were scientifically established in a given case. Our courts would probably display much learning in showing that the cat's death was not the "proximate cause" and again confuse causation with the subjective feature of the lack of prevision, in such case, of the "ordinary mind."

The average prudent man has not the faculty of prevision in all fields of causation. He may know that it is

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dangerous to cross a city street without looking or to jump from a moving train but he may know practically nothing of causation in chemistry, physics or physiology and use such fantastic and worthless remedies to cure his bodily ills as would make Aesculapius weep bitter tears.

For practical purposes, we may distinguish an ordinary and an expert prevision—the prevision, for example, of a man crossing a street and that of a surgeon performing a major operation or a chemist making a nitro-glycerine compound. It is obvious that the care required to avoid injurious consequences in each of these cases is different. We shall later see how the Austrian Civil Code recognizes this distinction.

The abstract standard of the average prudent man or the careful father of a family is too ideal and vague and the best formula seems to be that of the German Civil Code or the standard of "due care under the circumstances."

This due care may be determined by contact, by safety regulations privately adopted in various enterprises or by statutes and ordinances. For the simple acts of life, requiring no expert prevision, we may still let our juries guess how the average prudent man would act in the given circumstances.

Lack of space does not permit me to discuss the standard of care for a mental state other than that of the normal adult of sound mind and body. All these variations from the normal can be provided for by a stroke of the legislative pen, as the German Civil Code has admirably done:

"Art. 827. Whoever in a state of unconsciousness or in a state of morbid disturbance of mental activity, excluding the free determination of the will, causes damage to another is not liable for the damage. If he has, by spirituous liquors or similar means, put himself in a transient state of this kind, he is liable for the damage which he, in this state, illegally causes, in like manner as if he were negligent. Liability does not arise if he came into such state without fault on his part.

Art. 828. Whoever has not completed his seventh year of age is not liable for a damage he causes to another. Whoever has completed his seventh but not his eighteenth year of age is not liable for a damage which he causes to another if he, in the perpetration of the damaging act, does not have insight requisite to a knowledge of the liability. The same applies to a deaf mute."

(c) *Harm.* This is the element of "legally protected interests" (Von Jhering). The German Civil Code has specified them. Art. 823 provides: "Whoever intentionally or negligently illegally harms (*verletzt*) the life, the body, the health, the freedom, the property or other right (*sonstiges Recht*) of another is obliged to the latter to make reparation for the damage resulting therefrom." The legislature may determine the interests that require legal protection, as in the death statutes following Lord Campbell's Act of 1846. It may not have done so and the court, walking in the beaten paths of the common law, may deny recovery for the consequences of mere fright (Mitchell *v.* Rochester R. Co. 151 N. Y. 107, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121, 34 L.R.A. 781) or refuse damages for the personal injuries of an unborn child (Drobner *v.* Peters, 232 N. Y. 220, 133 N. E. 567, 21 N. C. C. A. 702, 20 A.L.R. 1503. Judge Pound, in the latter case, refused to make "judicial legislation" (p. 224). Suppose a plaintiff claims damages in a case like that where the statutes and common law are silent. The enlightened Swiss Civil Code of 1912 makes the following provision for such an emergency:

"Art. 1. The code is applicable to all questions of law for which, according to its wording or interpretation, it contains some provision. If no provision can be taken from the code, the judge shall decide according to the common law, and where this does not exist, he shall decide according to the rule that he would enact as a legislator. He shall therein follow approved doctrine and tradition."

(d) *Basis of X's Liability.* This is the element of legal duty. The common law stresses the principle that X is not liable to Y unless there was some legal duty of X, based on contract or otherwise, to exercise care towards Y. (45 C. J. pp. 639 et seq.). Moral duty is not enough (Id. p. 647). The civil law codes, on the other hand, stress the liability to make reparation. If the law gives damages to Y, is it necessary to expatiate on the legal duty of care on the part of X?

The question becomes important only when the negligent act of X violates a statute. Then we may ask whether the statute determines the standard of care and was intended for the protection of Y. We have already quoted the first part of art. 823 of the German Civil Code. The next parts provide: "The like obligation rests on the one who violates a statute aiming at the protection of another. If, according to the content of the statute, a violation of it without fault is possible, the duty of reparation arises only in case of fault." It seems that such considerations would obviate the learned discussions whether the violation of a statute, in a given case, is negligence *per se*, as a matter of law or merely evidence of negligence and remove the senseless distinction between violating a statute and a municipal ordinance.

Now, at last, what is negligence?

In general, it is the omission of due care. It does not enter the field of law until someone is thereby harmed. Omitting *laches* and negligence in a contractual obligation and restricting ourselves to negligence as a crime and as a tort, we offer the following:

"Each of the terms 'neglect,' 'negligence,' 'negligent,' and 'negligently,' imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns."—*Penal Law* of New York State, § 3, subdiv. 1.

Out of the wilderness of definitions of negligence as an actionable tort of the common law we select this gem:

"Negligence is an unintentional breach of a legal duty causing damage reasonably foreseeable without which breach the damage would not have occurred." Rodenbeck, J., in Grein *v.* Yohon, 103 Misc. 378, 385, 170 N. Y. Supp. 178, quoted in 45 C. J., p. 632.

Can the principles involved in such a definition be reduced to concise statutory form and give us some relief from the waxing burden of judicial opinions under which we now groan? I point to the following ray of light from the Austrian Civil Code:

"Art. 1294. The damage arises either from an illegal act or omission of another, or from accident. The illegal damaging is caused either voluntarily or involuntarily. The voluntary damaging is based on an evil intent, if the damage is with knowledge and will, or on negligence (*Versehen*), if it has been caused from culpable ignorance or from a lack of due attention or due diligence. Both are called a fault (*Verschulden*).

Art. 1295. Everyone has the right to demand from the damager reparation of the damage which the latter has caused to him through fault. The damage may have been caused through violation of a contractual duty or without relation to a contract.

Art. 1296. In case of doubt, the presumption obtains that the damage arose without another's fault.

Art. 1297. It will also be presumed, moreover, that everyone who has the use of his understanding (*Verstandesgebrauch*), is capable of such a degree of diligence and attention as can be used by persons of ordinary ability. Whoever by acts, whereby a curtailment of another's rights arises, omits this degree of diligence or attention makes himself guilty of a fault.

Art. 1299. Whoever makes public profession of an office, art, trade or handicraft or whoever, without necessity, undertakes a business, the execution of which demands special technical knowledge or an extraordinary diligence, makes known thereby that he assumes the necessary diligence and the requisite extraordinary knowledge. He must consequently be liable for the lack of the same. But if the one who entrusted the business to him, knew of his inexperience or, by ordinary attention, could have known, the latter must bear the blame.

Art. 1300. An expert is also liable if he negligently gives harmful advice for pay in matters of his own art or science. Except in this case, an adviser is liable only for the damage which he deliberately causes to another by giving advice.

Art. 1306. As a rule, one is not bound to make reparation for the damage which he has caused without fault or by an involuntary act.

Art. 1311. Pure accident (*blosser Zufall*) rests on the one in whose property or person it occurs. But if anyone by fault has occasioned the accident, if he has violated a statute which aims to prevent the accidental damage, or if, without necessity, he has intermeddled in another's affairs, he is liable for all the harm which without this would not have resulted.

Art. 1312. Whoever, in a case of necessity (*Notfall*) has rendered someone a service is not liable for the damage which he did not prevent, unless he shall by his fault have hindered another who would have done more. But, even in this case, he can set off the certainly caused benefit against the resulting damage."

And now what is the remedy for our burden of negligence opinions and books?

We refer to our last article in this review on "Help From Rome" and add this fervent prayer to St. Ives, the only lawyer who ever became a saint.

May our learned judges study other systems of law, think clearly and write tersely and not father opinions except in cases of novel impression. May they not claim a monopoly of legal wisdom. (Lord Eldon ruled that "one who had held no judicial situation could not reguarly be mentioned as an authority." Johnes *v.* Johnes, 3 Dow 1, 15, 3 Eng. Reprint, 969, cited in 40 C. J. p. 1250.) May

they "look for their law in the authentic and constructive writings of great lawyers rather than in that wilderness of precedents to which they now resort" (Sir John W. Salmond, 22 Columbia L. Rev. p. 207). May lawyers cease to be a group of obsequious Boswells gathering every Johnsonian crumb that falls from the bench and develop a body of "jurisprudence" of their own, as the civilians do (40 C. J. pp. 1250, 1251). And may lawyers and litigants help check the further spread of the judicial underbrush by imbibing the spirit of conciliation which has ruled for centuries the law claims of the "heathen" Chinese.—(*Wigmore: Panorama*, p. 148 et seq.).

The End

TO A YOUNG LAWYER

One of Charles Lamb's famous witticisms was directed toward an embryo lawyer, who, upon receiving his first brief, called in delight upon Lamb to tell him of it.

"I suppose," said Lamb, "you addressed that line of Milton to it, 'Thou first best cause, least understood.'"

CASE AND COMMENT invites its readers to submit original manuscripts on subjects of interest to the legal profession not exceeding twenty-five hundred words in length. All articles accepted will be paid for at the usual rates. Address A. W. Russell, Editor.

A.L.R. Annotations in Volume 66 Include These Subjects:

The key that is used grows bright.—Proverb.

Attachment — Nature and extent of relief of successful intervener or interpleader in attachment. 66 A.L.R. 908.

Attorneys — Authority of attorney to compromise suit. 66 A.L.R. 107.

Bonds — Right or duty of municipality, county, or other public body to pay premium on bond given by officer. 66 A.L.R. 795.

Conspiracy. — Instruction or evidence as to conspiracy where there is no charge of conspiracy in indictment or information. 66 A.L.R. 1311.

Corporations — Sale, or surrender of stock for sale, to pay assessment, as relieving stockholder from further liability. 66 A.L.R. 436.

Corporations — Validity and construction of corporate articles or by-laws relating to stock held by one retiring from corporate office or employment. 66 A.L.R. 1295.

Corporations — Validity and construction of contract or option, on purchase of corporate stock by employee, for resale thereof to original seller on termination of employment. 66 A.L.R. 1182.

Covenants — Provision in deed, or contract for sale of real property, discriminating against persons on account of race, color, or religion. 66 A.L.R. 531.

Criminal law — Duty to dismiss criminal proceedings on motion of attorney general or prosecuting attorney, pursuant to promise of immunity. 66 A.L.R. 1378.

Damages — Damages on account of medical expenses, past or future, due to injury to wife, as recoverable by her or by the husband. 66 A.L.R. 1189.

Damages — Excessiveness or inadequacy of damages in action against parents or immediate relatives for alienation of affections. 66 A.L.R. 609.

Descent and Distribution — Real property in other state, or its value, as a factor in computation of the interest of husband or wife in other's estate. 66 A.L.R. 733.

Discovery — Statute providing for examination before trial of party to action or anticipated action as applicable to corporation party. 66 A.L.R. 1269.

Easements — Loss of easement by adverse possession or nonuser. 66 A.L.R. 1099.

Elections — Constitutionality of statutes providing for use of voting machines. 66 A.L.R. 855.

Evidence — Admissibility on question as to quality, condition, or capacity of articles, machines, or apparatus, of evidence in regard to similar things manufactured or sold by the same person. 66 A.L.R. 81.

Evidence — Expert evidence to identify gun from which bullet was fired. 66 A.L.R. 373.

Evidence — Grantee or assignee of decedent as representative within meaning of statute relating to testimony as to transactions with deceased persons. 66 A.L.R. 1041.

Evidence — Right of witness to give summary based on inspection of number of documents. 66 A.L.R. 1206.

Executors — Effect of conduct of personal representative preventing filing of claims within time allowed by statute of nonclaim. 66 A.L.R. 1415.

Fraud — False statement by vendor, or his agent, as to price for which property in question, or property in vicinity, had been sold as ground for relief of purchaser. 66 A.L.R. 188.

Injunction — Remedies during promisor's lifetime for breach of agreement to give property at death. 66 A.L.R. 1439.

Insurance — Right of lessor or lessee or his privies to benefit of insurance

taken out by other or his privies. 66 A.L.R. 864.

Interest — Right of partners inter se in respect of interest. 66 A.L.R. 3.

Judgment — Decree or order directing or confirming sale of homestead for payment of debts as subject to collateral attack. 66 A.L.R. 926.

Landlord and tenant — Landlord's liability for damage to tenant's property by fire. 66 A.L.R. 1393.

Libel and slander — Imputation of mental disorder, impairment of mental faculties, or want of mental capacity, as actionable per se. 66 A.L.R. 1257.

Principal and surety — Right to benefit of contractor's bond or mechanic's lien statute for labor or material furnished to contractor or subcontractor, as affected by acceptance from him of written obligation. 66 A.L.R. 342.

Public improvements — Underground conduits for electric wires as local improvements supporting special assessments. 66 A.L.R. 1389.

Religious societies — Consolidation or merger of churches of same denomination as affecting property rights. 66 A.L.R. 177.

Schools — Liability of school district, municipal corporation, or school board, for injury to pupil. 66 A.L.R. 1281.

Statutes — Previous statute as affected by attempted but unconstitutional amendment. 66 A.L.R. 1483.

Trial — Right to reassemble jury after discharge, or after sealing verdict and separating, to correct or amend verdict or supply defect in rendition. 66 A.L.R. 536.

Trusts — Devise or legacy upon promise of devisee or legatee that another shall benefit as creating trust. 66 A.L.R. 156.

Wills — Statute governing as to time where disposition is made as in case of intestacy. 66 A.L.R. 1069.

Workmen's compensation — Employee temporarily engaged in personal business. 66 A.L.R. 756.

Workmen's compensation — One transporting children to or from school as independent contractor. 66 A.L.R. 724.

Mingle a little folly with your wisdom—Horace

A New Racket.—A prominent lawyer in Georgia had been successful in obtaining an acquittal for his client, who had been tried on a serious charge. The case had attracted wide attention and accounts of the trial had been published in a number of newspapers, including those in some of the larger cities.

A Chicago gangster was in jail charged with a very serious crime and read of the methods of defense alleged to have been used by the Georgia barrister. The Chicago man wired the attorney as follows:

"Am in jail charged with ——. How much will you charge to defend me?"

"Fifty thousand dollars," wired the Georgian.

"Your offer accepted. Come at once and bring your witnesses," answered the gangster.—Forbes.

A Trifle Mixed.—The duties of a justice of the peace included only an occasional marriage ceremony and at times he often found it difficult to dissociate the various functions of his office. He was marrying a couple one day and had reached the question: "Do you take this man to be your lawful husband?" The bride nodded emphatically. "And you the accused," continued the justice, turning to the bridegroom, "what have you to say in your defense?"

Within His Means.—An American lawyer was sitting at his desk one day when a Chinaman entered.

"You lawyer?" he asked.

"Yes, what can I do for you?"

"How much you charge if one Chinaman killum other Chinaman, to get him off?"

"Oh, about $500 to defend a person accused of murder."

Some days later the Oriental returned and planked down $500 on the lawyer's desk.

"All light," he said. "I killum."—Exchange.

Knew Them.—They were trying a case in court and the prosecution called a woman witness to the stand. His honor waited a moment while she arranged herself, then said:

"Well, madam what have you to say?"

"Nothing," replied the woman.

"Very well," said the Judge who had vast experience in dealing with women witnesses, "please be brief."

Quo Vadis?—Policeman (to motorist who nearly collided)—"Don't you know that you should always give half of the road to a woman driver?"

Motorist—"I always do, when I find out which half of the road she wan—Boston Transcript.

The Penalty.—Lawyer—And your wife says that if you don't pay the alimony more promptly—she'll come back to you again!—Judge.

De Mortuis Nil Nisi Bonum.—"And how much would you say this colt was worth?" asked the railroad claim-agent of the farmer.

"Not a cent less than $500!" emphatically declared that sturdy son of the soil.

"Pedigreed stock, I suppose?"

"Well, no," the bereaved admitted reluctantly. "But you could never judge a colt like that by its parents."

"No," the attorney agreed dryly. "I've often noticed how crossing it with a locomotive will improve a breed!"—Santa Fe Magazine.

One Side At a Time.—While waiting for the return of a verdict, the conversation among a group of lawyers and reporters turned to the idiosyncrasies of jury men.

"Old Judge Craig Biddle knew how to handle them," said Francis Shunk Brown.

"One day a juror arose and complained that he could not hear the evidence.

"'I'm deaf on one side,'" he explained.

"'That's all right, said the old judge. Don't let it worry you. In this court we

hear one side at a time.'"—Philadelphia Record.

Generosity? — MacDougal (dictating will)—And I leave $20,000 to every one of my servants who has been in my employ 20 years or more.

Lawyer—That is certainly generous of you.

MacDougal—It looks that way, doesn't it. But between you and me, not one has been with me more than three years. —Pathfinder, Washington, D. C.

And Blue.—Lawyer—Have you any proof that he hit you in the eye?

Witness—Proof! Why, here it is in black and white.—Tid-Bits.

But It's His Last Chance.—Lawyer (to actress bride)—But surely you don't want to arrange for a divorce on your honeymoon. When did you quarrel?

Bride—At the church—he signed his name in the register in bigger letters than mine.—Passing Show.

His Interest Aroused.—The Negro was being tried and asked for time to obtain legal assistance.

"Legal assistance!" snapped the judge. "You were caught in the jeweler's shop; two policemen saw you. You had the goods on you, and you have been convicted forty-two times. Now, what could a lawyer say for you?"

"Well, sah, judge," said the Negro, "that's just what I'll sure be interested tuh know."—Vancouver Star.

Indeterminate Sentence. — An uplift worker, visiting a prison, was much imprest by the melancholy attitude of one man she found.

"My poor man," she sympathized, "what is the length of your term?"

"Depends on politics, lady," replied the melancholy one. "I'm the warden."—Boston Transcript.

Not Punishment Enough.—Lawyer—Don't you think $25,000 cash would be punishment enough for his breach of promise?

The Aggrieved—No indeed: I want him to marry me.—Sun, Binghamton, N. Y.

Division of Labor.—Wife (at busy crossing)—"Now remember, Herbert, the brake is on the left—or is it the right—but don't——"

Henpecked Husband—"For heaven's sake stop chattering. Your job is to smile at the policeman!"—The Epworth Herald.

Giving Her an Even Break.—According to Judge Schauer a husband has a right to kiss his wife, "but if he gets too rough with her she can call a policeman."

Cops having such gentle ways.—New York American.

When Might Beats Right.—Wrecked Motorist (opening his eyes)—"I had the right of way, didn't I?"

Bystander—"Yeh, but the other fellow had a truck."—Life.

Can't Be Bothered.—Jones—Are you married?

Movie Actor—I really don't know. My lawyer attends to all those things.—Evening Globe, Boston.

Alibi Ike.—Old Lady—"If you really want work—Farmer Gray wants a right-hand man."

Wanderer—"Jus' my luck, lidy—I'm left-'anded!"—Passing Show.

Many New Ones Every Year.—Judge —"Young man, this court studied the law before you were born."

The Lawyer—"Yes, Yerroner, but I have studied the law since then."—Border Cities Star.

Hunter's Luck.—The two hunters had been out several hours and one of them had been growing uneasy. Finally panic overtook him. "We're lost!" he cried to his companion. "We've lost our way!"

"'Sall right," said his phlegmatic companion; "shoot an extra deer and the game warden will be here in two minutes."—Boston Transcript.

Whale of a Sameness.—"His face was lined with anxiety. He was morried." —Weekly paper. This is a misprint for either married or worried—the same thing, anyhow.—Humorist (London).

They'll Be Bootlegging Gravity.—We don't know much about Einstein's laws, but we know this: They'll never be able to enforce them.—Judge.

When Justice is Peevish.—A court of Negotin, South Serbia, has sentenced Mark Barbulovitch, robber notorious in three countries, to death and 138 years penal servitude.—Laramie (Wyo.) Republican Boomerang.

A Question.—Question: Can a judge marry anybody?

Answer: Yes.

Question: Well, why do so many remain bachelors?—Sentinel, Chicago.